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In The

# Supreme Court of the United States

October Term, 1954

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No. ———

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GEORGE H. BRASIER, PETITIONER,

V.

CITY OF LINCOLN, NEBRASKA; Mayor Clark Jeary, C. W. D. Kinsey, Rees Wilkinson, Joe E. Fenton, Hugh Thorne, Fern Orme, Pat Ash as members of and constituting the City Council of the City of Lincoln, Nebraska, RESPONDENTS.

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## PETITION FOR WRIT OF CERTIORARI.

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*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

George H. Brasier, the petitioner herein, prays that a writ of certiorari be issued to review final judgment of the Supreme Court of Nebraska reported in 28 S. C. J. 12, 159 Neb. 12, entered on June 25, 1954. A copy of the opinion of said court is hereto appended, marked Appendix A and made a part hereof.

The ground on which jurisdiction of this Court is invoked is that petitioner was deprived of individual rights, privileges and immunities guaranteed him under Section 10, Article I and Section 1 of the Fourteenth Amendment of the Constitution of the United States. The judgment sought to be reviewed was dated June 25, 1954, a timely motion for rehearing was made and on October 16, 1954, an order overruling said motion was made and issuance of mandate order withheld until January 15, 1955, pending appeal to the United States Supreme Court.

The jurisdiction of this Court to review the judgment by writ of certiorari is conferred by U.S.C.A. 1257 (3).

## QUESTIONS PRESENTED FOR REVIEW.

I. Did the court err in upholding the power of a city council to undertake the repeal of a valid ordinance, regardless of the nature of such ordinance and without regard to the prohibition of the supreme law? Did such action, the effect of which was to deny a water main granted under the terms of the original ordinance, amount to an invasion of vested rights of an individual guaranteed by Section 10, Article I or Section 1 of the Fourteenth Amendment of the Federal Constitution?

II. Did the court err denying this petitioner a mandatory injunction and a peremptory writ of mandamus as prayed for in his pleadings before the court?

III. May a subordinate agency of the state, in the absence of express authority and without express reservation in the body of the ordinance granting a water district, repeal same without violating the rights, priv-

ileges and immunities guaranteed an individual under either Section 10, Article I or Section 1 of the Fourteenth Amendment of the Federal Constitution?

IV. Is the enactment of statutes by the state legislature granting charter powers to a municipality to operate a waterworks a sufficient declaration of policy to authorize a subordinate agency of the state to undertake the repeal of a prior act where individual and property rights have become vested? A copy of such statutes is hereto appended, marked Appendix B and made a part hereof.

V. If question number four be construed to be such a declaration of policy, is it not an unlawful delegation of legislative power?

## STATEMENT OF THE CASE.

Petitioner, the owner of a tract of land situated in the City of Lincoln, Nebraska, designated as Lot 15 in Block 1, Cahn, Metcalf and Farwell's Subdivision, petitioned the city council for water service. The city council on September 2, 1952, enacted an ordinance (5337) creating Water District No. 313, preliminary for the installation of a local water main extension for the benefit of property in said district. The ordinance provides as follows:

> "BE IT ORDAINED by the City Council of the City of Lincoln, Nebraska: Section 1. That Water District No. 313 be and the same is hereby created; that said water district is created for the purpose of constructing a water main or water mains to supply water for domestic and fire purposes, for the following described real estate, which is here-

by included in said water district, to-wit: Lots 2 and 3 in Block 18, Riverside Addition; Lot 15 in Block 1, Cahn, Metcalf and Farwell's Subdivision. The cost of constructing said water mains, including the cost of fire plugs, valves and all other expenses incidental to said improvement, shall be assessed against the property benefited in said district, not exceeding the special benefits accruing on account thereof. Section 2. That all ordinances or part of ordinances in conflict herewith, be and the same hereby are repealed. Section 3. This ordinance shall take effect and be in force from and after its passage and publication according to law." Introduced by Roy A. Sheaff. Passed September 2, 1952. Victor E. Anderson, Mayor. ATTEST: Theo. H. Berg, City Clerk (SEAL).

Subsequent to the adoption of ordinance (5337) creating water district (313) and in reliance thereof, petitioner acting upon the proposition that the installation of the water main extension would be forthcoming as a considered contractual act on the part of the city council, proceeded to improve his property by earth moving and grading—thus establishing the foundation work preliminary to the receiving of and installation of water and for residential purposes. Still acting upon the faith that the water main would be installed as provided by the ordinance (5337), petitioner on October 6, 1952, petitioned the city council to proceed with the contemplated paving improvement in Paving District No. 252, said district being contiguous to his property. This would involve his property for another consideration in liability.

On the other hand the city council prior to the enactment of the ordinance (5337) received the investigated facts and after adoption and publication the

ordinance became law without any property owner objecting. The city then proceeded to draft the plans and specifications preliminary to the actual construction of the proposed water district. The record shows that the plan and profile of the water district (313) was completed by the city engineer's office on November 19, 1952.

About April 15, 1953, petitioner inquired of the deputy city engineer about progress on the construction of the water main in water district (313) and was informed that in all probability the city would install the water main with their own crew and equipment due to circumstances involving installation before paving and the size of the job concerned. A few days later petitioner received a formal letter from Mr. Fisher (the engineer) to the effect that his "superiors" were of the opinion that the water district (5337) was not necessary and that petitioner should construct his own water main at his own expense from Court Street (another water district) south to his property.

Between May and August, 1953, petitioner addressed the city council in person and by written communication on five different occasions demanding that construction be ordered by the council. On August 31, 1953, the city retaliated with the introduction of the repeal of ordinance (5337), and on September 2, 1953, adopted the repealing ordinance (5600).

Petitioner instituted this action in equity in the District Court of Lancaster County, Nebraska, seeking a two-fold relief: (1) To enjoin or arrest a repealing ordinance repealing a valid ordinance (5337) creating a public improvement designated as Water District

No. 313. (2) For the issuance of peremptory writ of mandamus to compel the city to carry out the mandate according to the provisions of said city ordinance (5337). Petitioner in his said petition raised the federal question by pleading Section 10, Article I and Section 1 of the Fourteenth Amendment of the Federal Constitution. The cause was submitted to the trial court with no significant conflict in the evidence, the issues were of law based upon a state of facts.

Upon hearing the matter, the trial court found the repealing ordinance (5600) did not violate or impair any individual rights or immunities of the petitioner under either Section 10, Article I or Section 1 of the Fourteenth Amendment of the Federal Constitution; that the city council had discretionary power to enact the repealing ordinance (5600) in question; that the petitioner acted at his own peril in assuming he had a contractual relationship with the city or that the water main would be installed and entered judgment for the respondents dismissing both causes of action. Upon appeal to the Supreme Court of Nebraska, the judgment of the trial court was affirmed. A copy of Constitutional Provisions presented to the Supreme Court is hereto appended, marked Appendix C and made a part hereof.

## REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

The decision of the Nebraska Supreme Court involves a federal question of substance many times determined by this Court in that this Court has perpetually recognized the fundamental principles of

rights and immunities under a legislative grant and the manner of enforcement of those rights and immunities.

That the clear import of the statutes cited by the Nebraska Supreme Court in its opinion as declaring a legislative policy dealing with water districts, appended hereto as Appendix A, indicates nothing more than a purpose on the part of the state to grant power to the city of Lincoln to operate a waterworks; the power to determine and create water districts both general and local extensions; the power to determine how the mandate of the ordinance shall be carried out, by contract or by the city and necessary appliances for fire protection; the statutes then recite the manner of contracting and the assessing by specials according to benefits. None of the statutes even remotely imply that any discretion exists to delay or repeal after a determination has been publically promulgated and the mandate becomes law.

Petitioner contended that the only legislative policy with respect to the creation of water districts and related matters was to carry out a public service according to the principles of the Doctrine of Public Policy and in the manner prescribed in the statutes.

The opinion of the Supreme Court of Nebraska failed to take into account the train of circumstances which made the ordinance (5337) a contract and not of the ordinary status of municipal legislation, and manifestly ignores the acts of the petitioner which furnishes a consideration for the ordinance (5337), so that same had a status of a contract, creating a vested right—a property right in the petitioner not to be impaired or abridged by any pretended repeal of said

ordinance. To recount the facts; the petitioner petitioned the city council for water service, the council acted and created a local water district by enacting and adopting ordinance (5337). This would involve his property in liability. The petitioner accepted the ordinance and made changes and improvements in and to his property relying upon the ordinance as a considered contractual act of the city. Followed a period of a year in which petitioner solicited the city to perform its contract to furnish him a water main. The city temporized and evaded on various pretexts and in retaliation to petitioner's persistence countered with an attempted repeal of Ordinance No. 5337, by ordinance (5600), which occurred on the day of the filing of this cause requesting injunctive relief against such maneuver and for a peremptory writ of mandamus to halt the tricky, evasive and down right dishonest behaviour of the city.

The decision of the court as it now stands sets a dangerous precedent in that it is not in accord with applicable decisions of this Court and is so obviously wrong and ill-advised that legal chaos, strife and turmoil may well ensue.

The Nebraska Supreme Court in its opinion by Justice Messmore said in part:

> "We conclude that the case Hiddleson v. City of Grand Island, (115 Neb. 287, 212 N. W. 619) supra, is in point in determining that the city council had the discretionary power to repeal the city ordinance creating water district No. 313."

This unhappy case has long been the subject of discussion in the profession as to what it decided or

whether it decided anything. Counsel for the city insisted in argument that this case determined all questions in the instant controversy and must be followed, honored and preserved, and counsel's faith had a mesmeric effect on both the trial and Supreme Courts who became quite entranced by his desperation.

A casual reading of the paragraph quoted in the opinion, appended hereto as Appendix A, emasculates itself so far as it might otherwise be authority to the effect that any council had a right to repeal a paving ordinance, much less being authority for the repeal of a water district denying a property owner a fundamental right, vested by the legislative act and the subsequent acts of the city and petitioner.

That part of Section 2 of Article VI of the home rule charter of the city of Lincoln quoted by the Court in its opinion, appended hereto as Appendix A, refers to the mandate of the ordinance, giving the city council the power to carry out the mandate in the manner here set forth:

> "Upon the creation of any water district, the city council shall have the power to construct or cause to be constructed, either by contract with the lowest responsible bidder or directly by the city, such water main or mains, or extensions or enlargements, including all necessary appliances for fire protection, within such districts as the council shall determine,* * *."

These steps are proprietary, ministerial and mechanical. They relate to approval of the city engineer's plans, the letting of the contract or a direction to the city engineer to do the work through his own department. They do not involve any further notice to the

property owner or any further dealings with him. In the instant controversy none of these steps were a part of the ordinance and in the nature of the charter could not be. Neither does their accomplishment require an additional or auxiliary ordinance. These magic steps required merely the consultation in a proprietary capacity with directions to the city engineer. Exhibit No. 10 carries out the thought in regard to this point. The remainder of these steps quoted by the court under Section 19 of Article IV are of the same classification and were not forthcoming owing to the maneuvers of a political nature which unfortunately do not appear in the record.

That part of Section 199, at page 970 in 34 Am. Jur. quoted by the court in its opinion, appended hereto as Appendix A, does not include the last three lines of the paragraph and the references thereto. They read thus:

> "Mandamus to public service corporations to compel them to perform their duties as to furnishing a supply of the commodity which they undertake to furnish to the public has been considered above." "See supra, Sec. 18, et seq."

The Doctrine of Honest Construction is the only salvation for this petitioner, his funds are tied up in his property, his property is tied up with an assessment for paving, his water is tied up in court and his business enterprise is tied up pending determination, test and measure of the supreme law. How could an innocent citizen be in a more embarrassing and exposed position? He needs help! Ordinance No. 5600, repealing Ordinance No. 5337, is on the books!

The power of the courts to declare rectification is not based upon logic alone. An important influence may be traced back to the statement of Sir Edward Coke in Dr. Bonham's Case, 8 Co. 118a (1610):

> "And it appears in our books, that in many cases, the common law will control acts of parliament, and sometimes adjudge them to be utterly void; for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void."

The decision of the Supreme Court of Nebraska as it now stands denies the petitioner the protection which the fundamental law awards him, and approves the unlawful confiscation of the petitioner's property, which the fundamental law is designed to protect. The court did not, and, we submit, the court could not distinguish between the instant controversy and the numerous cases consistently followed by this Court, to-wit:

The Impairment of the Obligation of Contract:

*Atlantic Coast Line R. Co.* v. *Goldsborough,* 232 U. S. 548.

*Bacon* v. *Texas,* 163 U. S. 207.

*Baltimore Trust & Guarantee Co.* v. *City of Baltimore,* 64 Fed. 153.

*Cuyahoga River Power Co.* v. *Akron,* 240 U. S. 462.

*Dartmouth College* v. *Woodward,* 4 Wheat. 518, 17 U. S. 518.

*Fletcher* v. *Peck,* 6 Cranch 87, 3 L. Ed. 162.

*Mercantile Trust & D. Co.* v. *Columbus,* 203 U. S. 381.

*Meriweather* v. *Garrett*, 102 U. S. 472.
*Murray* v. *Charleston*, 96 U. S. 432.
*New Orleans Waterworks Co.* v. *Rivers*, 115 U. S. 674.
*New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 336.
*New Orleans Waterworks Co.* v. *Louisiana Sugar Ref. Co.*, 125 U. S. 18.
*Pacific Electric R. Co.* v. *Los Angeles*, 194 U. S. 112.
*St. Paul Gaslight Co.* v. *St. Paul*, 181 U. S. 142.
*United States* v. *New Orleans*, 98 U. S. 381.
*Vicksburg* v. *Vicksburg Waterworks Co.*, 202 U. S. 453.
*Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U. S. 65.
*Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1.

Statutes as Contracts:

*Carondelete Canal & Nav. Co.* v. *Louisiana*, 233 U. S. 362.
*Fletcher* v. *Peck*, 6 Cranch 87, 3 L. Ed. 162.
*New Jersey* v. *Yard*, 95 U. S. 104, 114.

Mandamus:

*Marbury* v. *Madison*, 1 Cranch 137, 2 L. Ed. 60.

In the event it should be decided that statutes are conditions precedent sufficient to authorize a municipality to repeal by ordinance a former act declaring a grant to a property owner to furnish a water main preliminary to water service for domestic purposes, a judicial examination should be made as to the validity

of such statutes preliminary to a final and just disposition in the light of supreme law.

WHEREFORE, petitioner respectfully submits that the writ of certiorari should issue to the end that this Court may review the decision of the Supreme Court of Nebraska and determine whether that court has deprived petitioner of rights and immunities guaranteed by either Section 10, Article I or Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Respectfully submitted,

HERBERT W. BAIRD,
138 North 12th Street,
Lincoln 1, Nebraska,
*Attorney for Petitioner.*

## APPENDIX A

GEORGE H. BRASIER, APPELLANT v. CITY OF LINCOLN, NEBRASKA, ET AL., APPELLEES.

— N. W. 2d —

Filed June 25, 1954. No. 33546.

1. *Municipal Corporations.* Where a city council by its home rule charter is empowered to create a water district and by ordinance has created such a district, and by the home rule charter additional procedural steps must be taken before the actual construction of the water district may be had, the city council in its discretion may repeal the ordinance creating the water district when none of the additional procedural steps have been taken as required by the home rule charter.

2. ———. Where a city council in conformity with the home rule charter has created a water district by ordinance and repealed the same prior to taking the necessary additional steps to improve the water district as provided for by the home rule charter, the city council has not abused its discretion in such respect and its decision is determinative, and mandamus will not lie to control or review it.

Appeal from the district court for Lancaster County: PAUL W. WHITE, JUDGE. *Affirmed.*

*Herbert W. Baird*, for appellant.

*John H. Comstock* and *Jack M. Pace*, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

This is an action in equity brought in the district court for Lancaster County by George H. Brasier, plaintiff, against the city of Lincoln, the mayor, and the members of the city council, defendants, the purpose of the action being to enjoin the defendants and each of them from repealing city ordinance No. 5337, and that the court issue an alternative writ of mandamus directing the defendants to forthwith proceed to construct or have constructed a water main in conformity with ordinance No. 5337 which created water district No. 313. The trial court decreed that the alternative writ of mandamus which was issued be dissolved; that the plaintiff's petition be dismissed with prejudice; and that judgment be entered in favor of the defendants, plaintiff to pay the costs. The plaintiff's motion for new trial was overruled. From the order overruling the motion for new trial the plaintiff appeals.

The record shows that the plaintiff owned real estate in the city of Lincoln which he purchased in May or June of 1952. This real estate is described as being 510 feet in length and 50 feet in width, bounded on the west by Twelfth Street, on the east, north, and south by public alleys, being Lot 15, Block 1, Cahn, Metcalf, and Farwell's Subdivision of the city of Lincoln. The plaintiff described this property as an isolated piece of property. Its peculiar shape is apparently the result of the failure of two subdivisions to properly coincide. The plaintiff sought to develop this property for the purpose of having a "mobile home subdivision," which

was to be set out in lots, and which he proposed to rent on a yearly basis. This type of home requires no foundation or concrete construction. In order to properly operate such an enterprise, water, sewerage, and electric services are the physical improvements that go with the installation of such units. Plats were made by engineers employed by the plaintiff to assist in the preparation of the land for the purpose to which he proposed to use it, and the premises were cleaned up for that purpose.

The council record shows that on August 4, 1952, the plaintiff petitioned the city council to create a water district and to construct a water main to serve his property. On September 2, 1952, ordinance No. 5337 creating water district No. 313 was adopted by the city council. The ordinance provides as follows: "BE IT ORDAINED by the City Council of the City of Lincoln, Nebraska: Section 1. That Water District No. 313 be and the same is hereby created; that said water district is created for the purpose of constructing a water main or water mains to supply water for domestic and fire purposes, for the following described real estate, which is hereby included in said water district, to-wit: Lots 2 and 3 in Block 18, Riverside Addition; Lot 15 in Block 1, Cahn, Metcalf and Farwell's Subdivision. The cost of constructing said water mains, including the cost of fire plugs, valves, and all other expenses incidental to said improvement, shall be assessed against the property benefited in said district, not exceeding the special benefits accruing on account thereof." There is an affidavit of publication of the ordinance dated September 4, 1952, in the record.

The plaintiff, from an examination of the records of the city council, ascertained that no objections had been filed by property owners to the adoption of ordinance No. 5337.

The record of the city council for September 22, 1952, shows a request addressed to the city council that a paving district be created in Holdrege Street from Twelfth Street to and across Thirteenth Street, described as 16-foot alley-type paving, to be assessed against the properties of the plaintiff and the other property owners. Ordinance No. 5353 was passed by the city council and adopted on September 22, 1952, creating paving district No. 252, which includes all of that portion of the east and west alley lying north of and adjacent to Lot 15, Block 1, Cahn, Metcalf and Farwell's Subdivision, which is included between the east curb line of Twelfth Street and the east line of Eva Place extended south, and Lots 1, 2 and 3 in Block 18, Riverside Addition, and the west 210 feet of Lot 15, Block 1, Cahn, Metcalf and Farwell's Subdivision, to be 16 feet in width.

On October 6, 1952, the Spartan Enterprises, a partnership consisting of the plaintiff and another person, petitioned the city council to pave in paving district No. 252, and charge its property with the cost by special assessment.

On or about November 19, 1952, there was a plan and profile of water district No. 313 prepared by the city engineer's office which did not become a part of the records of such office. It was merely a plan to be presented to the city council for its consideration. The plaintiff saw this plan. However, the plan was not approved or put into effect.

On April 15, 1953, the plaintiff inquired of the city engineer's office concerning the water main to be laid. He testified that the city engineer's office reacted favorably and informed him that possibly the city would go ahead and install the water main. A few days later, in a letter dated April 18, 1953, the deputy city engineer informed the plaintiff that he had taken up with his superiors the matter of constructing the water main in Thirteenth Street from Court Street south to the alley; that it was the present opinion of his superiors that the necessary water service to the plaintiff's property could be better secured by the plaintiff constructing, at his own expense, his own water service line from Court Street south to his property; that a city water main in the plaintiff's location was not needed; and that any further discussion about the matter should be had with the city engineer.

The plaintiff testified that prior to receiving the letter from the deputy engineer's office, he relied on the ordinance creating water district No. 313 and commenced to improve his property for the purpose of installing a mobile home subdivision.

By stipulation appearing in the record it was stipulated that the plaintiff made a request for the creation of a water district about July 15, 1952; that at that time the deputy city engineer assured the plaintiff that a water district would be formulated by the usual procedure; that the plaintiff, relying upon this assurance proceeded to improve his property in the matter of cutting down the elevations and filling up the depressions; that between July 25, 1952, and August 19, 1952, the plaintiff moved about 150 cubic yards of earth in connection with the improvement by the use

of rented machinery at a cost of $45.05, and also for surveying and drafting in connection with the improvement he expended the sum of $33.50; that the plaintiff himself performed the labor involved; that between September 9, 1952, and July 7, 1953, after the enactment of the ordinance creating the water district, the plaintiff moved about 100 cubic yards of earth in connection with the said improvement by rented machinery at a cost of $26; and that these items of expense were incurred by the plaintiff upon the faith and reliance of city ordinance No. 5337 creating water district No. 313 and in conformity thereto.

After receiving the letter from the deputy city engineer, the plaintiff made demands upon the city council to order the construction of water district No. 313 in conformity with ordinance No. 5337. Appearances were made before the council for that purpose. On September 8, 1953, the city council, by ordinance No. 5600, adopted on that date, repealed ordinance No. 5337 creating water district No. 313.

It appears from the record that the improved property in the vicinity of this water district created by ordinance was served either directly from a city main or by private line connected thereto. It also appears that there were sufficient fire hydrants in the area which were adequate for fire protection. The plaintiff was never denied the right to connect with the city water main, and the city council stood ready at all times to grant him the privilege to do so. It also appears from the record that a great deal of the work done by the plaintiff to improve his property was done prior to the time the ordinance creating the water district was adopted, and a part of it was done after

the plaintiff had received the letter from the deputy city engineer to the effect that it was not feasible to create the water district under the circumstances. This indicates that the plaintiff did not act to his detriment in reliance upon the conduct of the defendants.

From the record it appears that the plaintiff, about the time he requested the water service and paving, petitioned the city for a special permit to construct and operate mobile home units on his property. The council referred the matter to the zoning board. On August 11, 1952, the zoning board recommended that the plaintiff's application for such permit be denied. The city council denied the application. There was no appeal taken from the decision of the city council. This property was zoned for residence "A" building. At the time of trial the plaintiff testified that he still intended to use the property for a mobile home subdivision, which apparently means that he was not going to construct residential property on his property as required by the zoning ordinance, or request a building permit for such purpose.

On September 8, 1953, the date ordinance No. 5600 was adopted which repealed ordinance No. 5337 creating water district No. 313, the instant case was commenced, apparently prior to the adoption of ordinance No. 5600.

The plaintiff assigns as error that: (1) The trial court erred in dissolving the alternative writ of mandamus and dismissing plaintiff's petition. (2) The trial court erred in failing to find the attempted repeal of ordinance No. 5337 was in excess of the powers of the city council. (3) The trial court erred in failing to issue a peremptory writ of mandamus compelling the

defendants to make the improvement in water district No. 313 in conformity to ordinance No. 5337. (4) The trial court erred in ignoring the vested constitutional rights of the plaintiff in the continued existence of water district No. 313. (5) The trial court erred in overruling plaintiff's motion for a new trial.

Section 2 of Article VI of the home rule charter of the city of Lincoln provides in part: "The city council shall have power to create water districts for the purpose of supplying water for domestic, industrial or fire purposes, or for any one or more of said purposes, or for the purpose of enlarging any water mains now existing or hereafter constructed. All such districts, to be known as 'water districts,' shall be created by ordinance and shall designate the property in the district to be benefited. Upon the creation of any water district, the city council shall have power to construct or cause to be constructed, either by contract with the lowest responsible bidder or directly by the city, such water main or mains or extensions or enlargements, including all necessary appliances for fire protection, within such districts as the council shall determine, and assess the costs thereof against the property in such district, not exceeding the special benefits accruing on account thereof * * *."

When a water district is created as above provided for, then section 19 of Article IV of the home rule charter of the city governs the city council's procedure. It provides: "Before the city council shall enter into any contract or authorize any expenditures involving over $500.00, they shall cause to be made and filed an estimate of the total cost thereof, together with detailed plans and specifications, which, if ap-

proved by the city council, shall be kept subject to public inspection and the work or improvement shall be done substantially in accordance therewith. No contract shall be entered for a price exceeding such estimate, and the city council shall, except in cases of emergency, advertise for bids and cause the amount of such estimate to be published therein."

The city council did nothing more than to create a water district, and subsequently, by ordinance, repealed the ordinance creating the water district. From a reading of the above articles and sections of the home rule charter of the city of Lincoln it is apparent that before the city council can legally commence to construct a water district the steps as set forth in section 19 of Article IV of the City charter must occur in sequence. The question arises, did the city council, in repealing ordinance No. 5337 creating the water district, violate any contractual and vested rights as claimed for by the plaintiff, or whether the city council, in the exercise of its discretion, could legally repeal the ordinance creating the water district.

The case of Hiddleson v. City of Grand Island, 115 Neb. 287, 212 N. W. 619, is applicable. In that case the city of Grand Island, by ordinance, created a paving district and after more than 2 years had taken no steps towards the laying of the pavement. A mandatory injunction was sought to require the city council to proceed with the paving in conformity with the ordinance creating the paving district. At that time section 4084, Comp. St. 1922, was in force. It provided in part: "The mayor and council shall first, by ordinance, create a paving district or districts. * * * If the owners of the record title representing a majority

of the abutting property owners in the district shall file with the city clerk within twenty days * * * written objections to the paving * * * said work shall not be done in said district under said ordinance, * * *. If said objections be not filed against any district in the time and manner aforesaid, the mayor and council shall forthwith proceed to construct such paving, * * *."

The section of the statute above referred to has on occasions been amended by the Legislature. It is now referred to as section 16-620, R. S. Supp., 1953. The applicable language appearing therein, as it applies to cases such as Hiddleson v. City of Grand Island, *supra*, has not been substantially changed to effect any different meaning.

It has long been the rule that if the words used in a legislative act had, at the time used, received a settled construction, we must presume that the Legislature adopted them in that sense. See Franzen v. Blakley, 155 Neb. 621, 52 N. W. 2d 833.

In Hiddleson v. City of Grand Island, *supra*, the court said: "The failure to pave during this period, in our judgment, could not operate to invalidate the ordinance creating the district. The district is still in existence and it is still within the power of the council to pave at a future date, and, if there is no good reason for further delay, the council should proceed to advertise for bids and to pave the district as directed by the statute, unless the council, in its wisdom, should see fit to repeal the ordinance creating the district. Without deciding the questions, we assume that it is within the discretion of the council to repeal the ordinance which created the district,

but, unless the council has the right to and does repeal the ordinance, then it should proceed, as expeditiously as circumstances and prudence will permit, to advertise for bids and construct the paving, as provided by statute."

It will be noted that in Article VI, section 2, of the home rule charter of the city of Lincoln the language used therein is as follows: "Upon the creation of any water district, the city council shall have power to construct or cause to be constructed," and then it states the method of construction, "within such districts as the council shall determine." In Hiddleson v. City of Grand Island, *supra*, the statute provided that the council "shall forthwith proceed to construct such paving."

It appears from the foregoing that the home rule charter of the city of Lincoln in creating a water district requires a step which is a condition precedent before other steps can be taken for the purpose of constructing a water district as provided for by the articles and sections of the home rule charter cited above. We conclude that the case of Hiddleson v. City of Grand Island, *supra*, is in point in determining that the city council had the discretionary power to repeal the city ordinance creating water district No. 313.

In 6 McQuillin, Municipal Corporations (3d ed.) § 21.17, p. 199, it is said: "Street and other improvement ordinances, and indeed all ordinances involving the creation of contracts or rights thereunder, may be repealed under like conditions and restrictions as other municipal legislation, provided that the repeal does

not invade property rights or destroy vested interests or impair the obligation of contracts."

The plaintiff contends that a proposition or offer made to the proper corporate authorities and an acceptance of the terms thereof by an ordinance constitutes a contract, and that an ordinance passed by the governing body of a municipality granting a right, if accepted and acted upon by the grantee, becomes an irrevocable contract, citing Winklebleck v. City of Portland, 147 Or. 226, 31 P. 2d 637; 10 McQuillin, Municipal Corporations (3d ed.), § 29.03, p. 163. In addition, the plaintiff contends that a legislative grant, right, or privilege made by ordinance through a municipal corporation duly authorized to act, and accepted and acted upon by the grantee constitutes a contract and creates a vested right in the grantee which cannot be impaired, altered, or abolished by a repeal or amendment of the ordinance unless the right to repeal or amendment is reserved in the enactment itself. Otherwise a repeal of such ordinance is an impairment of the obligation of such contract by the municipality and constitutes a violation of Article I, section 10, of the Constitution of the United States, section 1 of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 3 of the Constitution of the State of Nebraska.

Many cases have been cited in support of the above propositions which are clearly distinguishable from the case at bar and it would unduly lengthen this opinion to set such cases out and discuss the distinction between them and the instant case. The repeal of the ordinance in question did not invade any property rights or destroy any vested interest as claimed by the

plaintiff, nor impair any obligation of a contract in violation of the Constitution of the United States or the Constitution of the State of Nebraska.

In 34 Am. Jur., Mandamus, § 199, p. 970, it is said: "Ordinarily, a municipality or quasi municipality, such as a district organized to supply its inhabitants with water, gas, etc., is not bound to furnish a supply to everyone that demands it, regardless of the expense involved and the returns which will result in so doing, * * *. As a general rule, the municipality which engages in furnishing water or other such supply to its inhabitants has a governmental discretion as to the limits to which it is advisable to extend its mains, and unless such discretion is abused, the decision of the municipality in the matter is determinative, and mandamus will not lie to control or review it. The writ has been refused when sought to compel a municipality or a water district to extend its water system or mains, * * *."

A court has no power by mandamus to control the decision of those matters which are left by statute to the discretion of the governing body of a governmental agency. See, State ex rel. Evans v. Brown, 152 Neb. 612, 41 N. W. 2d 862; State ex rel. Weinberger v. Gormley, 155 Neb. 242, 51 N. W. 2d 343; State ex rel. Nebraska Beer Wholesalers Assn. v. Young, 153 Neb. 395, 44 N. W. 2d 806; State ex rel. Kittel v. Bigelow, 138 Ohio St. 497, 37 N. E. 2d 41; Larsen v. Nordbye, 181 F. 2d 765; Annotation, 45 A. L. R. 829.

We conclude, for the reasons given herein, the trial court did not err in dissolving the alternative writ of mandamus and dismissing the plaintiff's petition at plaintiff's costs.

AFFIRMED.

## APPENDIX B

### CITY ENGINEER, DUTIES, ESTIMATES, CONTRACTS

Sec. 19. Before the city council shall enter into any contract or authorize any expenditures involving over $500.00, they shall cause to be made and filed an estimate of the total cost thereof, together with detailed plans and specifications, which, if approved by the city council, shall be kept subject to public inspection and the work or improvement shall be done substantially in accordance therewith. No contract shall be entered for a price exceeding such estimate, and the city council shall, except in cases of emergency, advertise for bids and cause the amount of such estimate to be published therein. Such advertisement shall be published in some daily newspaper of general circulation in the city for at least ten days. The city council may by unanimous vote authorize the purchase of supplies or the expenditure of funds for the operation or maintenance of any utility operated by the city without estimate or advertising for bids, in which event supplies so authorized may be purchased in the open market.

### WATER DISTRICTS

Sec. 2. The city council shall have power to create water districts for the purpose of supplying water for domestic, industrial or fire purposes, or for any one or more of said purposes, or for the purpose of enlarging any water mains now existing or hereafter

constructed. All such districts, to be known as "water districts," shall be created by ordinance and shall designate the property in the district to be benefited. Upon the creation of any water district, the city council shall have power to construct or cause to be constructed, either by contract with the lowest responsible bidder or directly by the city, such water main or mains, or extensions or enlargements, including all necessary appliances for fire protection, within such districts as the council shall determine, and assess the costs thereof against the property in such district, not exceeding the special benefits accruing on account thereof, in the manner provided by Section 14 of Article VIII. One-fifth of such special assessments shall be delinquent in fifty days after the levy and one-fifth annually thereafter, each installment to draw six per cent interest from levy, payable annually, installments delinquent to draw three fourths of one per cent interest per month. For the amount of the special assessments, bonds of the city known as "water district bonds" may be issued by the city council payable in not to exceed five years from date with interest not exceeding six per cent per annum, payable annually, and such special tax and assessment shall constitute a sinking fund for the payment thereof. (Amendment of November 4, 1919.)

## APPENDIX C

GEORGE H. BRASIER, Plaintiff,

vs.

No. 33546

NOTICE

CITY OF LINCOLN, NEBRASKA, ET AL., Defendants.

Comes now the plaintiff and gives notice to the clerk of the court in the above-entitled cause to wit:

Notice is hereby given that the matters herein complained of violate the following enumerated Constitutional Provisions involving the Constitutionality of the following Statutes.

1. Lincoln City Ordinance No. 5600 violates the following: Section 10, Article I of the Constitution of the United States and Section 1, Article XIV of the Amendments thereupon.

2. Section 22-1102, Lincoln City Code, 1936, violates the following: Section 1, Article XIV of the Amendments to the Constitution of the United States.

3. Lincoln City Ordinance No. 5600 violates the following: Sections 3 and 16 of Article I of the Constitution of the State of Nebraska.

4. Section 22-1102, Lincoln City Code, 1936, violates the following: Section 1, Article I of the Constitution of the State of Nebraska.

GEORGE H. BRASIER
*Attorney for Plaintiff*

## APPENDIX D

### SUPREME COURT OF NEBRASKA.

### JANUARY TERM, A. D. 1954.

June 25.

**No. 33546.**

GEORGE H. BRASIER, APPELLANT,

V.

CITY OF LINCOLN, NEBRASKA, ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF LANCASTER COUNTY.

This cause coming on to be heard upon appeal from the district court of Lancaster county, was argued by counsel and submitted to the court; upon due consideration whereof, the court finds no error apparent in the record of the proceedings and judgment of said district court. It is, therefore, considered, ordered and adjudged that said judgment of the district court be, and hereby is, affirmed; that appellees recover of and from appellant their costs herein expended, taxed at $_____; for all of which execution is hereby awarded, and that a mandate issue accordingly.

Robert G. Simmons
Chief Justice.

Supreme Court )
) ss.
State of Nebraska )

I, George H. Turner, Clerk of the Supreme Court
the State of Nebraska, do certify that I have co
pared the foregoing copy of Judgment, in the case
Brasier vs. City of Lincoln, No. 33546, with the origi
now on file in my office, and that the same is a corr
transcript thereof, and of the whole of said original.

IN TESTIMONY WHEREOF, I have hereunto
my hand and caused to be affixed the Seal of
Court, at the City of Lincoln, this 20th day of Dec
ber, 1954.

(Seal) signed/ Geo. H. Turner, Cle

COPY BOUND

# PETITION

# FOR

# REHEARING

In The

# Supreme Court of the United States

October Term, 1954

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No. 471

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GEORGE H. BRASIER, PETITIONER,

V.

CITY OF LINCOLN, NEBRASKA; Mayor Clark Jeary, C. W. D. Kinsey, Rees Wilkinson, Joe E. Fenton, Hugh Thorne, Fern Orme, Pat Ash, as members of and constituting the City Council of the City of Lincoln, Nebraska, RESPONDENTS.

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## PETITION FOR REHEARING ON APPLICATION FOR WRIT OF CERTIORARI.

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The petitioner respectfully submits the court's decision to deny the writ of certiorari herein prayed is erroneous and improvident. A mistake by this court must be due to failure of counsel in presentation.

The most probable failure of counsel perhaps consisted in failure to clearly show that the petitioner, George H. Brasier, a citizen of the State of Oklahoma, obtained an irrevocable grant under Ordinance No. 5337 based upon a consideration furnished by him making same a contract not to be impaired or abridged.

He acted upon this ordinance by improvements on his property upon the faith of the ordinance. Further acting on the faith of the ordinance - grant - contract he furnished further consideration by obligating his property for paving which imposed a liability on his premises and would be valuable if under benefit of Ordinance No. 5337, otherwise worthless.

The relief sought is upon the direct authority of the cases hereto cited:

The Impairment of the Obligation of Contract:

*Atlantic Coast Line R. Co.* v. *Goldsborough*, 232 U. S. 548.

*Bacon* v. *Texas*, 163 U. S. 207.

*Baltimore Trust & Guarantee Co.* v. *City of Baltimore*, 64 Fed. 153.

*Cuyahoga River Power Co.* v. *Akron*, 240 U. S. 462.

*Dartmouth College* v. *Woodward*, 4 Wheat. 518, 17 U. S. 518.

*Fletcher* v. *Peck*, 6 Cranch 87, 3 L. Ed. 162.

*Mercantile Trust & D. Co.* v. *Columbus*, 203 U. S. 381.

*Meriweather* v. *Garrett*, 102 U. S. 472.

*Murray* v. *Charleston*, 96 U. S. 432.

*New Orleans Waterworks Co.* v. *Rivers*, 115 U. S. 674.

*New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 336.

*New Orleans Waterworks Co.* v. *Louisiana Sugar Ref. Co.*, 125 U. S. 18.

*Pacific Electric R. Co.* v. *Los Angeles*, 194 U. S. 112.

*St. Paul Gaslight Co.* v. *St. Paul*, 181 U. S. 142.

*United States* v. *New Orleans*, 98 U. S. 381.
*Vicksburg* v. *Vicksburg Waterworks Co.*, 202 U. S. 453.
*Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U. S. 65.
*Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1.

Statutes as Contracts:

*Carondelete Canal & Nav. Co.* v. *Louisiana*, 233 U. S. 362.
*Fletcher* v. *Peck*, 6 Cranch 87, 3 L. Ed. 162.
*New Jersey* v. *Yard*, 95 U. S. 104, 114.

Mandamus:

*Marbury* v. *Madison*, 1 Cranch 137, 2 L. Ed. 60.

We have discovered no cases in derogation of these cases, nor have any such cases been suggested by counsel for respondents. Perhaps the failure of counsel for respondents to reply formed a handicap. These cases cited, in principle establish a definite property right in the petitioner, which has been invaded and destroyed by respondents in plain violation of constitional rights and immunities guaranteed by either Section 10, Article 1 or Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Wherefore, petitioner prays the writ of certiorari herein applied for and requested may be allowed or in the alternative grant leave to make a direct appeal to this Honorable Court in the interest of natural justice.

Respectfully submitted,

HERBERT W. BAIRD,
*Attorney for Petitioner.*

## CERTIFICATE.

Herbert W. Baird, attorney for petitioner, hereby certifies the above is restricted to Rule 58 of the Revised Rules of this Court and is for the purpose of obtaining justice and not for the purpose of delay.

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HERBERT W. BAIRD,
138 North 12th Street,
Lincoln 8, Nebraska,
*Attorney for Petitioner.*